RESERVED

CIVIL MISCELLANEOUS WRIT PETITION N O.3989 OF 1999-old number
CIVIL MISCELLANEOUS WRIT PETITION N O.1742 OF 2001-new number

State ----------Petitioner
Versus

Presiding Officer, Labour Court
And another ----------Respondents

Hon'ble M.M. Ghildiyal, J.

The petitioner has challenged the award-dated 31.03.1998 passed by the Presiding Officer, Labour Court, Haldwani, district Nainital published on 26.10.1998.

The facts of the case are that a reference under section 4 K of Industrial Disputes Act, 1947 was referred by the State Government to the Labour Court, Haldwani for adjudication on the issue:-

'' क्या सेवा योजको द्वारा अपने श्रमिक श्रीकृष्ण कुमार की सेवाये दिनांक 29.5.95 से समाप्त किया जातना उचित वैधानिक हैं, यदि नही तो सम्बन्धित किस हितलाभ अन्य किन विवरणें सहित प्राप्त करनें का अधिकारी हैं?''

After the reference the Presiding Officer issued notices and the parties have filed their statements. The respondent no.2 has stated before the Labour court that he was engaged in the department as daily wage labour on the post of Chaukidar in store on 1.1.1989 and continuously worked in the department till 29.05.199. He moved an application for regularization of his services, which resulted in oral termination of the services of respondent no.2 on 29.05.1995 without any notice and retrenchment allowance.

The petitioner filed written statement that Jamranibandh Khand-5 Haldwani came into existence for the first time on 10.08.1989. The respondent no.2 has never worked for 240 day in any calendar year. It has further been pleaded that the irrigation department discharges sovereign function and as such does not come under the definition of 'industry' and the respondent no.2 is not a workman.

Learned Labour court passed aweard on 31.3.1998 holding that the services of respondent no.2 were orally terminated without giving any notice

to him and there was clear violation of section 6 of U.P. Industrial Disputes Act, 1947 and as such directed the petitioner to reinstate respondent no.2 in service and to pay 50 per cent back wages alongwhith Rs. 100.00 as costs of litigation.

Heard learned Standing Counsel for the petitioner and Sri Gopal Narain learned counsel for respondent no.2.

Learned Standing Counsel has submitted that the respondent no.2 was a daily wager and as such does not come under the definition of workman. He has placed reliance on the judgment of Allahabad High Court between **State of U.P. and Labour Court, Haldwani and others, 1999 (81) F.L.R.319** in which it has been held as under:-

> The employment of the respondent no.2 being on a day-to-day basis, the same came to an end every evening and there was fresh employment every next day. Therefore, refusal to employ him from a particular day did not amount to retrenchment so as to attract the provisions of section 25-F of the Industrial Disputes Act. In my view, therefore, the Labour Court was not right in holding that the termination of the petitioner's services was unlawful and unjustified. As discussed above, there was no termination by the employer i.e. the government. It was only refusal to employ further."

This judgment was set aside by the Apex Court in the case of **Deep Chandra Vs. State of U.P. and another, reported in (2001 (88) FLR 508.)** The Apex Court in paragraph no.2 in the aforesaid case has held as under:-

> " The High Court approached the matter rather strangely as it went at a tangent to consider not only whether the causal worker's services can be put to an end to but if the award made by the Labour Court would make him permanent employee, so on and so forth. The High Court lost sight of the point in issue that is, when and employee had put in service for more than 240 days in each year for several years whether his services can be put to an end to without following the procedure prescribed under Section 25-F of the Industrial Disputes Act. If there has been violation thereof such an employee will have to be reinstated in his original service on the same terms and conditions in which he was working earlier. If this is the position in law, we fail to understand as to how the High Court could have interfered with the award made by the Labour Court. We set aside the order made by the High Court and restore the award made by the Labour Court. The appeal is allowed accordingly."

On the basis of findings recorded by the learned Labour Court it is clear that though the petitioner has contended that the workman was a daily

wager and therefore, the provisions of section 6 N of U.P. Industrial Disputes act, 1947 do not apply has no force as from the findings it is clear that the workman had worked for about seven years and in that case if he was to be terminated, the procedure for retrenchment was required to be followed which was not applied and as such the findings of the Labour Court could not be found at fault.

Learned Standing Counsel has submitted that respondent no. 2 has never worked for 240 days in a calendar year and the learned Labour Court has erred in holding that the workman had worked for seven years continuously in the department and had worked more than 240 days in a calendar year. The submission of the learned Standing Counsel is that the findings recorded by learned Labour Court are not based on any document on the record. Learned Labour Court has recorded a finding that the petitioner has not filed muster roll before the Labour Court. The learned Labour Court has recorded a finding that from the record available with the court, it appears that though the work has taken from respondent no. 2 continuously for seven years but the department has adopted unfair labour practice some time by showing the name of the respondent no.2 in the muster roll and for some time showing the name of other persons though the payment was made to the respondent no.2.

If the department has not produced the relevant documents, which should be and are available with the department an adverse inference for non-production of vital primary documents can always be drawn against the department. The Apex Court in a number of cases has held that the Court can draw inference against the department if the necessary documents which are in possession of the department are not filed before the court. In the case of **H.D.Singh Vs. Reserve Bank of India and others, reported in 1985 (51) FLR 494** the Apex Court has dealt with the matter of non-prosecution of the documents by the department as also unfair labour practice by the department. While dealing with this matter the Apex Court has held in paragraph no.11 as under:-

> “The confidential circular directing the officers that workmen like the appellant should not b e engaged continuously but should as far as possible be offered work on rotation basis and the case that the appellant is a badli worker have to be characterized as unfair labour

practice. The 5th Schedule to the Industrial Disputes Act contains a list of unfair labour practice as defined in Section 2 (ra). Item 10 reads as follows:

To employ workmen as 'badlis', casual or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen.

We have no option but to observe that the bank, in this case, has indulged in methods, amounting to unfair labour practice. The plea that the appellant was a badli worker also has to fail. "

Learned Standing Counsel has further submitted that the irrigation department does not come under the definition of 'industry' and the respondent no.2 is not a workman and as such the reference against the irrigation department was not maintainable. He has relied on the judgment of Apex Court in the case of **Executive Engineer (State of Karnataka) v. K. Somasetty and others, reported in 1997 (76) FLR 851 (SC)** in which the Apex Court has held as under:-

"It is well –settled legal position that the irrigation department and Telecommunication department are not an Industry' within the meaning of definition under the Industrial Disputes Act as held in Union of India v. Jai Narain Singh, and in State of U.P. v. Suresh Kumar Verma. The function of public welfare of the State is a sovereign function. It is constitutional mandate under the Directive Principles that the Government should bring about welfare State by all executive and legislative actions. Under these circumstances, the State is not and Industry' under the Industrial Disputes Act. Even otherwise, since the project has been closed, the respondent has no right to the post since he had been appointed on daily wages.

The Apex Court in the case Coir board Erankkulam, Cochin and others v. India Devi P.S. and others, 1998 (78) FLR 847 (SC) after noticing the conflict in the judgment of Hon'ble two Judges, referred the matter to the Hon'ble Chief Justice of India for a decision by larger Bench. The larger Bench by a short order rejected the reference and held that judgment delivered by seven-Judge Bench in Bangalore Water Supply and sewerage Board V. A.Rajappa (supra) does not require consideration on a reference made by a two-Judge Bench. The order is reproduced as under:-

We have considered the order made in Civil Appeals Nos. 1720-21 of 1990. The judgment in Vangalore Water Supply and Sewerage Board v. A Rajappa was delivered almost two decades ago and the law has since been amended pursuant to the judgment through the date of enforcement of the amendment has not been notified.

The judgment delivered by seven learned Judges of this Court in Bangalore Water Supply case does not, in our opinion, require any

reconsideration on a reference being made by a two judge Bench of this court, which is bound by the judgment of the larger Bench."

In view of the above decision of the Apex Court the submission of the learned Standing Counsel has no force and the irrigation department is an 'industry'.

For the reason stated above the writ petition is devoid of merit and is dismissed accordingly. No order as to costs.

(M.M. Ghildiyal, J.)

May 9, 2003
MPS